



After a May 12, 2009 preliminary hearing, the ALJ entered an Order For Compensation finding claimant suffered accidental injury on July 26, 2008, arising out of and in the course of his employment with respondent. The ALJ further ordered payment of temporary total disability compensation until receipt of a court ordered independent medical examination regarding additional medical treatment. The ALJ also entered an Order Referring Claimant For Independent Medical Evaluation.

Respondent appealed the decisions to the Board and the Order For Compensation was affirmed and the appeal of the Order Referring Claimant For Independent Medical Evaluation was dismissed.

On May 14, 2009, the ALJ ordered an independent medical examination by a doctor at the Dickson Diveley Orthopedic Clinic to determine whether or not claimant's right shoulder complaints are a direct and natural consequence of the original injury which occurred in May 2008. Dr. Thomas P. Phillips performed a physical examination and diagnosed claimant as having posterior instability of the right shoulder. The doctor recommended an MRI of the right shoulder followed by an arthroscopic capsulorrhaphy to stabilize the shoulder.

Dr. Phillips opined that the prevailing factor responsible for claimant's shoulder problems is the injuries of April and May 2008 preceding the alleged work-related injury of July 2008. He further opined that there is a 90 percent chance of recurrent subluxation/dislocation of the shoulder after the initial event.

Upon receipt of Dr. Thomas P. Phillips' report, the ALJ entered the instant order denying claimant further medical treatment and discontinuing the payment of temporary total disability compensation.

Respondent argues the Board does not have jurisdiction to address this issue on review from a preliminary order. This Board Member does not agree. On appeals from preliminary hearing orders K.S.A. 44-534a gives the Board jurisdiction to consider the following issues: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice is given or claim timely made; (4) whether certain defenses apply. These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. In this instance, the preliminary hearing order denied medical treatment because the court found the causation opinion of Dr. Phillips compelling. As such, the issue is whether the injury for which claimant is seeking medical treatment arose out of and in the course of the employee's employment. The Board has jurisdiction to review this issue on an appeal from a preliminary hearing order.

As for the merits of claimant's appeal, this Board Member agrees that the record compiled to date fails to prove that claimant's present need for medical treatment is due to personal injury by accident on July 26, 2008, that arose out of and in the course of his

employment with respondent. Consequently, the Board must deny claimant's request for benefits.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>1</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>2</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated July 30, 2009, is affirmed.

**IT IS SO ORDERED.**

Dated this 30th day of September 2009.

---

DAVID A. SHUFELT  
BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant  
Donald J. Fritschie, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge

---

<sup>1</sup> K.S.A. 44-534a.

<sup>2</sup> K.S.A. 2008 Supp. 44-555c(k).